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No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R.D. HOLLOWAY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

In the decision below, the Ninth Circuit refused to consider one of its own precedents that, it acknowledged, "is closely on point and could make a difference in the outcome of this case." JA 26-27. Instead, it created a new rule, applicable only to qualified immunity decisions, that requires it to disregard any legal authorities not cited to, or discovered by, the district court.

Evidently hesitant to defend the Ninth Circuit's decision on its own terms, Respondents begin their Brief by urging this Court *not* to review the Ninth Circuit's holding, but to decide the issue that the Ninth Circuit itself deliberately declined to decide. As we discuss below in Part I, Respondents' effort to redefine the question presented should be rejected. The

question presented in this case, namely the propriety of the Ninth Circuit's novel rule of refusing to consider authorities not cited below, is logically antecedent to the question of whether those authorities clearly establish a violation of federal rights, and the proper application of Ninth Circuit precedent should not be resolved in the first instance by this Court. Moreover, if this Court were to go beyond the question presented, the precedent that the Ninth Circuit refused to consider and disputed factual issues identified by the district court preclude granting Respondents' motion for summary judgment on their qualified immunity claim.

In Part II, we show that Respondents' arguments in defense of the Ninth Circuit's rule that uncited law must be disregarded on appeal in qualified immunity cases merely repeat the two flaws in the Ninth Circuit's analysis. First, Respondents claim that appellate courts may not consider uncited authorities because plaintiff has the "burden of showing" a violation of clearly established law. But this argument overlooks the difference between factual and legal issues and, in particular, ignores the appellate court's duty to declare the correct legal rule, even if the relevant authorities were not located by the parties or the district court. Second, Respondents argue that the public policy behind qualified immunity favors the Ninth Circuit's rule. The decision below, however, upsets the balance struck by this Court's qualified immunity decisions by mandating the dismissal of meritorious claims and immunizing officials who violate clearly established federal rights solely because a claimants' lawyer stumbles in locating authority in the trial court. Because it frustrates the purposes of appellate review and upsets the balance this Court has struck in the qualified immunity doctrine, the "Elder rule" must be set aside.

I. RESPONDENTS' REQUEST THAT THIS COURT RULE THAT THEY ARE ENTITLED TO QUALIFIED IMMUNITY IN LIGHT OF THE APPLICABLE LAW, INCLUDING THE PRECEDENT THAT THE NINTH CIRCUIT REFUSED TO CONSIDER, MUST BE REJECTED.

The principal argument of Respondents and their *amici* is that this Court should not review the propriety of the Elder rule, but should instead decide that Respondents prevail on their qualified immunity claim even if the authority that the Ninth Circuit disregarded, *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), is considered. *See* Brief of Respondents at 6-20 ("Resp. Br."); Brief Amici Curiae of the States of Hawaii, *et al.* at 4-14 ("Amici Br."). This argument should be rejected because (A) the issue is not properly before the Court; and (B) if this Court were to decide the issue, the Ninth Circuit precedent and disputed factual issues concerning the circumstances of the arrest require that Respondents' motion for summary judgment on qualified immunity be rejected.

A. The Issue of Whether Respondents Would Prevail On Their Qualified Immunity Claim Is Not Properly Before, And Should Not Be Decided By, This Court.

Respondents urge that this Court assume, without deciding, that the limitation on appellate review established in the Elder rule is erroneous, and decide the issue that the court below left open when it declined to consider whether its prior decision "clearly established" the law at issue. This proposal to avoid reviewing the Elder rule should be rejected for three reasons.

First, the issue the Respondents urge this Court to reach is not the question on which review has been granted. The Petition makes quite clear that it does not seek review of whether the Ninth Circuit should have held that the law was clearly established, but whether the Ninth Circuit erroneously limited its review to the authorities presented to the district

court.[1] The fact that Respondents' argument goes beyond the question presented is, alone, enough to exclude it from consideration. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764-65 (1993); *Berkemer v. McCarthy*, 468 U.S. 420, 443 n. 38 (1984).

Second, the issue that Respondents urge this Court to reach is not "a subsidiary question fairly included" within the question presented. Sup. Ct. Rule 14(a); *Yee v. City of Escondido*, 112 S.Ct. 1522, 1533-34 (1992). To the contrary, the relationship between the two questions is the reverse. The question of which legal authorities should be considered in determining whether the law is clearly established must be resolved before a court can address whether those legal authorities "clearly establish" a violation of protected rights.

Indeed, "the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), requires the courts to decide first which legal authorities to consider in making that determination. For this reason, Respondents' reliance on *Siegert v. Gilley*, *supra*, is misplaced. In *Siegert*, this Court indicated that qualified immunity issues should be resolved in an "analytical structure" that resolves preliminary issues first. *Id.* at 1793. In this case the question of whether the Elder rule improperly limits the legal authorities considered is a preliminary issue in the resolution of the qualified immunity issue that Respondents urge this Court to decide. Thus, *Siegert* not only does not support Respondents' position that the Court should avoid reviewing the Elder rule, but underscores that this

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[1] *See* Petition for a Writ of Certiorari at i ("The Elder rule sets forth the proposition that in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. Therefore, the question presented here is whether a party on appeal may rely *only* on those authorities cited to the district court") (emphasis in original).

Court should not "assume[] without deciding this preliminary issue." *Id.* at 1793.[2]

Third, the issue that Respondents urge this Court to reach should be decided by the lower courts, and not by this Court in the first instance. This Court generally avoids deciding issues that were not addressed by the lower courts. *Yee v. City of Escondido*, 112 S.Ct. at 1534. That practice is particularly appropriate here for two reasons. First, the issue of whether the Ninth Circuit's decision in *Al-Azzawy* was sufficient to "clearly establish" that an arrest effected by surrounding a house requires a warrant absent exigent circumstances is a legal question that should be addressed by the Ninth Circuit. Moreover, the district court concluded that disputed issues of fact precluded it from deciding on summary judgment whether the failure to obtain a warrant was excused by "exigent circumstances." JA 16. The district court's ruling on this point strongly counsels against this Court trying to resolve the immunity issue on the current record.

B. If It Is Considered By This Court, Respondents' Claim That, Despite *United States v. Al-Azzawy*, They Are Entitled To Summary Judgment Based On Qualified Immunity Must Be Rejected.

Respondents' qualified immunity claim raises two distinct issues: (1) whether it was "clearly established" in April, 1987,

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[2] Respondents also err in stating that in *Seigert* this Court held that the initial inquiry in a civil rights case should be the qualified immunity issue of "whether the plaintiff asserts the violation of a clearly established right." Resp. Br. at 6. To the contrary, the Court concluded that the first inquiry is "the determination of whether the plaintiff has asserted a violation of a constitutional right at all," 111 S. Ct. at 1793, and because the allegations in *Siegert* failed to state such a claim, it was not necessary to address the appellate court's holding concerning a heightened pleading standard for qualified immunity.

that an arrest that is effected by surrounding a house and requesting that the individual inside surrender requires a warrant, absent exigent circumstances; and (2) whether, if this legal rule was clearly established, it was reasonable for Respondents to conclude that exigent circumstances existed. If this Court chooses to go beyond the question presented to decide these issues in the first instance, Respondents' claim must be rejected because *Al-Azzawy* clearly established that a warrant was required absent exigent circumstances, and Respondents' claims of "exigency" rest on disputed facts that cannot be resolved on summary judgment.

1. *United States v. Al-Azzawy* Clearly Established That An Arrest Under The Circumstances Presented Here Requires A Warrant Absent Exigent Circumstances.

Over a year prior to the arrest in this case the Ninth Circuit declared that where officers surround a residence and, with a "show of force and authority," order the occupant to leave the residence, the Fourth Amendment requires that, absent exigent circumstances, the officers must obtain a warrant for the arrest. *United States v. Al-Azzawy*, 784 F. 2d at 893. Respondents' contention that this decision did not clearly establish the legal rules with respect to this issue does not withstand scrutiny.

Respondents' arguments that precedents other than *Al-Azzawy* did not clearly resolve the issue, Resp. Br. at 13-17, are beside the point. *Al-Azzawy* directly addressed the issue, and there was (and still is) no contrary authority in the Ninth Circuit that would cast doubt on *Al-Azzawy*'s conclusion on this question. The only Ninth Circuit decision that Respondents rely on here, *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), held that no warrant was required where the defendant was arrested after voluntarily opening the door in response to the arresting officer's knock. Resp. Br. at 15-16. That decision does not diminish the clarity of the Ninth Circuit's subsequent holding that where, as here, an individual does "not voluntarily expose himself to [the arresting officers'] view or control outside" the residence, but

is ordered to exit "under circumstances of extreme coercion," a warrant is required. *Al-Azzawy*, 784 F.2d at 893.

Amici dismiss *Al-Azzawy* by arguing that lower court decisions should be disregarded, and officials should be denied qualified immunity only if this Court's opinions foreclose all substantial doubts that a right is "clearly established." Amici Br. at 9-10, 11-13. None of this Court's precedents support this novel proposal, and it would require routine dismissal of civil rights claims on qualified immunity grounds, except for those few cases that involve conduct indistinguishable from conduct that this Court has previously held violates federally protected rights. Moreover, the issue of whether a conflict among the circuits is sufficient to demonstrate that the law is not clearly established is not presented here because each circuit that has addressed the issue decided in *Al-Azzawy*, both before and after *Al-Azzawy*, has reached the same conclusion as the Ninth Circuit.[3]

Respondents also err in suggesting that *Al-Azzawy*'s conclusions concerning the warrant requirement must be disregarded as "dicta" because *Al Azzawy* ultimately held that the arrest was justified by exigent circumstances. Resp. Br. at 18; Amici Br. at 14. A legal conclusion in a decision may

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[3] *See United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986); *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

Respondents' statement that *State v. Morse*, 480 A.2d 183 (N.H. 1984), "acknowledged that there was a split of authority as to whether a warrant was required under the circumstances," is erroneous. Resp. Br. at 15. *Morse* observes that "[j]urisdictions are split on whether *Payton [v. New York*, 445 U.S. 573 (1980)] invalidates warrantless arrests occurring immediately after the defendant opened a door in response to a police knock," 480 A.2d at 186. The decision does not state that there is any disagreement that, absent exigent circumstances, a warrant is required when an arrest is effected under the circumstances presented in *Al-Azzawy* and in this case.

"clearly establish" the law even if it is not the ultimate holding of the case. For example, this Court's conclusion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the courts have the power to review claims that executive officials have failed to perform mandatory duties represented an authoritative declaration of the law on that issue, even though the court ultimately held that it lacked jurisdiction to issue the writ. This Court's qualified immunity decisions also make plain that law is not "established" solely by the precise holdings of cases, because, under such a test, an official would always be immune "merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 (1985). Qualified immunity must be denied if "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Under this standard, the Ninth Circuit's conclusions in *Al-Azzawy* concerning the need for a warrant where the police surround an arrestee at a residence cannot be disregarded in the qualified immunity analysis.

Respondents next contend that the Ninth Circuit's reference to *Al-Azzawy*, as "arguably applicable and dicta," Resp. Br. at 18, supports their claim that the district court's qualified immunity ruling would not be affected if *Al-Azzawy* was considered. Resp. Br. at 18. This argument, however, merely begs the question. Because the Ninth Circuit deliberately decided *not* to resolve this issue, and even declared that its decision could not serve as precedent in other cases where *Al-Azzawy* was cited, JA 43, the court's discussion cannot be construed as having decided the issue in favor of Respondents. Indeed, the appellate court acknowledged "that *Al-Azzawy*'s initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest

after he had come outside his house pursuant to an order to exit." JA 35.[4]

Finally, respondents argue that, because *Al-Azzawy* noted that it was "'a close question'" whether the warrantless arrest was lawful, Respondents must be entitled to qualified immunity. Resp. Br. at 18-19 (quoting *Al-Azzawy*, 784 F.2d at 894). The "close question" language, however, does not refer to the issue of whether the warrant requirement is triggered when officers surround a house and order a suspect to exit under a show of force, but to the distinct issue of whether the failure to obtain a warrant in *Al-Azzawy* was excused by "exigent circumstances." *Al-Azzawy*, 784 F.2d at 894. As we show below, Respondents cannot take refuge in this language because the facts relating to the "exigent circumstances" issue in *Al-Azzawy* were substantially different from those presented here and, moreover, in this case the facts concerning "exigent circumstances" are in dispute.

2. The Warrantless Arrest Was Not Justified By Exigent Circumstances.

Respondents also argue that they are entitled to qualified immunity because they reasonably concluded that there was no time to secure a warrant under the circumstances. Resp. Br. 20. The district court, however, held that factual disputes precluded resolving whether the warrantless arrest was justified by "exigent circumstances," JA 16, and the court of appeals declined to address the issue. JA 32. This Court should not second-guess the district court reading of the factual record and, in any event, the district court's conclusion was plainly correct.

The evidence shows that Respondents had ample opportunity to obtain a warrant before arresting Petitioner. Respondents received reports that there were outstanding warrants for Petitioner and that Petitioner was armed and hostile on April

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[4] We also note that, contrary to their current argument that *Al-Azzawy* supports their claim of qualified immunity, Respondents declined to rely on *Al-Azzawy* below. JA 35.

21, 1987, six days before the arrest. Four days before the arrest, Respondents confirmed that Florida authorities had issued arrest warrants for Petitioner. Two days before the arrest, an Ada County officer conducted surveillance at the house and identified Petitioner there. Nonetheless, no effort was made to obtain an arrest warrant before Respondents went to the home to arrest Petitioner on April 27, 1987. *See* Dep. of R. Holloway 35-36, 62-65, Exhibits 1, 2.[5]

The evidence also belies any claim that Respondents did not plan to arrest Petitioner when they went to the home without a warrant. Respondents went to arrest Petitioner *after* they had already been informed that Petitioner had left the work-site where he was employed, and proceeded immediately from the work-site to the home. Indeed, officers were waiting for Petitioner at the house even before he returned from the work-site. Respondents surrounded the house, summoned additional officers to the scene, blocked the roads, and cleared all houses in the immediate area. Dep. of R. Holloway at 68-83. Their claim that they intended "to surveil the residence and arrest Elder once he exited," Resp. Br. at 1, is, at best, a matter in dispute that is contradicted by the testimony and conduct which confirm that Respondents planned to arrest Petitioner at the home whether he exited voluntarily, or was forced to exit after being surrounded. *See* Dep. of R. Holloway at 35, 81, Exhibit 2 at 8.

Finally, Respondents created the circumstances that they claim justify the failure to obtain a warrant before arresting Petitioner. Contrary to Respondents' claim that they sought to arrest Petitioner in the home only because Petitioner's brother

[5] The advance notice and planning by Respondents show that the circumstances of the arrest here are not comparable to those held sufficient to establish "exigent circumstances" in *Al-Azzawy* where there were no advance reports or surveillance, and the arrest was made shortly after the officers were first summoned to the home to investigate a disturbance. *Al-Azzawy*, 784 F.2d at 891, 894.

"discovered" the officers conducting surveillance, Resp. Br. at 20, the evidence shows that the officers were not "discovered," but stopped Petitioner's brother, William Elder, when he left the home on horseback.[6] The officers immediately enlisted William Elder to tell Petitioner that he should surrender because the house was surrounded by armed officers. *Id.* On this record, the district court properly rejected Respondents' claim that they were entitled to summary judgment on their assertion that there was no time to obtain a warrant before the arrest.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE LEGAL ISSUE OF WHETHER THE LAW IS CLEARLY ESTABLISHED MUST BE DECIDED SOLELY BASED ON THE LEGAL AUTHORITIES CITED OR IDENTIFIED BELOW.

In our opening brief we showed that the restriction on appellate review created by the Ninth Circuit is flawed in two respects: it is inconsistent with the role of appellate courts in deciding legal issues, and inconsistent with the rationale behind qualified immunity. In defending the holding below, Respondents repeat these same errors. Like the Ninth Circuit, their argument is based on treating legal issues like factual issues, and ignoring the competing public interests that the qualified immunity standard seeks to balance.

A. Issues of Law Are To Be Decided Based On All The Relevant Legal Authorities.

Respondents contend that the Elder rule is justified as (1) a burden of proof rule, (2) an exercise of appellate discretion, or

[6] The official report on the incident states, "William Elder was allowed to ride his horse east on Hanks Street, then south on Carpenter Street to near the intersection of Columbia Road, where he was stopped by Det. DeVeny and a uniformed patrol officer who had been called to the area for assistance." Dep. of R. Holloway, Exhibit 2 at 7. *See also* Dep. of William Elder at 57-58 (Petitioner's brother did not realize police were in the area until stopped by officer who drove up behind him).

(3) a deferential standard of appellate review. Each of these arguments is fundamentally flawed because the appellate court's role in deciding issues of law is not simply to select among the views of the parties and the district court, but "to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991).

1. Respondent's principal argument is that the Elder rule properly places the "burden of showing" that legal rules are clearly established on the plaintiff, in the same way that plaintiffs normally have the burden of alleging a *prima facie* case or proving facts. Resp. Br. at 21-26, 31-32. The fundamental defect in this argument is that it treats legal precedents as if they were facts to be proven and, indeed, echos the Ninth Circuit's argument that precedents should be treated as "legal facts." JA 39-40. Unlike factual issues, however, legal issues are not dependent on evidence under the control of the parties or unique to a particular case. For these reasons, this Court has never suggested that a precedent should be disregarded if it is first cited on appeal. While factual issues are to be decided based on the record created by the parties, legal issues are to be decided by applying the governing legal norms, which do not depend on the parties or the particular case.

This Court's decisions underscore this difference between legal and factual issues. In *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481 (1943), the Court upheld a jury verdict against the railway based on a rule promulgated by the Interstate Commerce Commission. The Court rejected the argument that the Rule could not be considered on appeal "because it was not called to the attention of the trial court or the jury." *Id.* at 488. Rules that have the force of law are not a matter of proof, this Court held, but are to be judicially noticed, and a party is entitled to the benefits of a valid legal rule even if counsel failed to call it to the attention of the trial court. *Id.* at 488-89.

Similarly, in *Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877), this Court held that the question whether bonds were

invalid, because the law authorizing their issue had never been properly enacted, was not a factual matter that a party could be estopped from raising or even had the burden of alleging. "[I]t was not necessary to have raised an issue on the subject, except by demurrer to the declaration." *Id.* at 268. "The question as to the existence of a law is a judicial one," and the courts are obligated to resolve the question in accordance with the applicable legal authorities. *Id.*

Respondents' argument that these principles do not apply to review of the legal issue in qualified immunity claims because this Court, and other courts, have stated that the plaintiff has the "burden of showing" a deprivation of clearly established rights, *see* Resp. Br. at 21-25, reads far too much into the language of those decisions. Plaintiffs have a "burden of showing" a violation in that they must make factual allegations and, at the summary judgment stage, must show factual proof of a violation of clearly established law. But nothing in *Davis v. Scherer*, 468 U.S. 183 (1984), or this Court's other decisions indicates that the "burden of showing" language was also intended to convert the "purely legal issue" of "whether the facts alleged . . . support a claim of violation of clearly established law," *Mitchell v. Forsyth*, 472 U.S. at 528 n.9, into an issue of proof. As Judge Kozinski observed in his dissent, "[i]n none of [this] Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if, though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established." JA 56-57. The test for qualified immunity is whether the facts show a violation of clearly established law, not whether the facts show a violation of the precedents cited.[7]

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[7] Moreover, even if precedents were treated like facts, this would not justify the Elder rule, which allows an appellate court to consider cases as long as the district court "come[s] up" with the law on its own. JA 43. Surely, a district court could not consider facts that the plaintiff had failed to introduce into the

2. Respondents also argue that the decision below should be upheld as an exercise of discretion to refuse to correct a legal error. Resp. Br. at 28-31. The decision below, however, cannot be fairly portrayed as an exercise of discretion limited to the facts of this case. The Ninth Circuit did not base its decision on its own discretionary authority, but on its construction of this Court's decision in *Davis v. Scherer*, 468 U.S. 183 (1984). JA 38-39; *cf. Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1978 (1993) (Scalia, J., concurring) (appellate practice based on erroneous reading of Supreme Court precedents is abuse of discretion). Moreover, the Ninth Circuit did not limit its decision to this case, but cast its holding as a nondiscretionary restriction on appellate review that applies generally, and has been applied, to qualified immunity cases. *See* JA 43, 44-45; *Beckman v. Dillard*, No. 92-15418, slip op. (9th Cir. Aug. 12, 1993). Indeed, the Court acknowledged that it was crafting an exception to the ordinary rule that "the district court must divine and apply the law correctly, no matter what cases are cited by the parties," and "[t]he court of appeals has a correlative obligation to correct error when it occurs." JA 41.

More fundamentally, Respondents' argument that "[t]he panel certainly had discretion not to correct Elder's error whether the error was law or fact," Resp. Br. at 30, once again ignores the differences between determinations of law and fact. The principles of estoppel that apply to facts do not apply to issues of law. *Town of South Ottawa v. Perkins*, 94 U.S. at 267. Even if the parties were to formally stipulate that a court should disregard certain precedents in deciding a legal issue, a court would not have discretion to declare and apply an erroneous legal rule based on an artificial universe of legal authorities chosen by the parties. *Young v. United States*, 315 U.S. 257, 259 (1942) (determination of legal issues "cannot be left merely to the stipulation of the parties"); *cf. Muskrat v.*

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record.

United States, 219 U.S. 346, 362 (1911) (courts lack authority to render advisory opinions).

Respondents' argument that, because courts have the discretion not to consider a legal *issue*, they also have the discretion to disregard a legal *precedent*, is also flawed. Resp. Br. at 33-34; *Amici* Br. at 16. The discretion to leave a legal issue undecided does no violence to the court's law-declaring function because, in withholding judgment, the court does not declare or apply an incorrect legal rule. In contrast, if, as Respondents argue, a court has the discretion to disregard relevant authority, the law-declaring function is corrupted because the ruling purposefully rests on an incomplete review of the applicable law. Such a decision violates a basic norm of adjudication because the decision is not applicable to similarly situated parties, but is a rule created for, and applied to, only the parties in that particular case. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987); *Town of South Ottawa v. Perkins*, 94 U.S. at 267. When a court makes and applies rules in such an *ad hoc* manner its "'function is not one of adjudication but in effect of legislation.'" *Griffith*, 479 U.S. at 323 (1987) (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).

Moreover, this Court has made clear that, although parties generally cannot raise new legal issues on appeal, if a claim or issue was presented below, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S.Ct. at 1532. It is anomalous to suggest that, although parties can raise any new legal arguments based on issues raised below, they cannot rely on precedents that support those arguments unless the cases were cited below. Indeed, Respondents' proposition that appellate courts have general discretion to disregard applicable precedents when they review legal issues is inconsistent with the appellate courts' function of providing independent review that brings "to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge." *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

Finally, even if one assumes that courts may be justified in exercising discretion to disregard precedent that was not cited below in some unusual cases, such a practice cannot be justified in qualified immunity cases in light of the countervailing interests in vindicating deprivations of constitutional rights. *Cf. Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. at 1976-78 (practice of vacating judgments cannot be supported because of countervailing public interests). Civil rights actions serve important public policies by deterring abuse of official authority, and by providing "the only realistic avenue for vindication of constitutional guarantees," in many cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). No "overriding consideration of public policy" is served by permitting appellate courts to dismiss meritorious civil rights claims because the precedent demonstrating that the law was clearly established was not identified in the district court. *Forrester v. White*, 484 U.S. 219, 224 (1988). Indeed, this Court has repeatedly emphasized that the courts do not have the authority to expand the scope of absolute immunity from actions under 42 U.S.C. § 1983 to serve other policy interests. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613 (1993). The same considerations require rejecting Respondents' argument that qualified immunity should be expanded by limiting review of legal issues in the name of appellate discretion.[8]

3. Finally, Respondents argue that the Ninth Circuit's decision is justified as a deferential review of district court decisions on legal issues analogous to the abuse of discretion

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[8] Thus, the suggestion in footnote 5 of *Kamen v. Kemper Financial Serv., Inc.*, 111 S. Ct. 1711 (1991), that failure to comply with a "reasonable local rule" may provide a basis for a court to sanction a litigant by deciding a claim according to a truncated body of law does not apply here since the Ninth Circuit has no such local rule, the decision below was based on its construction of this Court's decision in *Davis* rather than its own discretion, and countervailing considerations weigh against such a practice in the qualified immunity context.

standard approved in *Pierce v. Underwood*, 487 U.S. 552 (1988). Resp. Br. at 34-38. The central problem with this argument is that the Elder rule is not a standard of deferential review, but a rule of preclusion or estoppel. The Elder rule does not involve deferring to a district court's assessment of relevant factors under a general standard, but requires an appellate court to affirm even where it is clear that the district court did not consider controlling authority and has made a very specific, but erroneous, ruling of law. Thus, *Pierce* provides no support for the Elder rule. *Pierce* held only that the abuse of discretion standard governs review of a ruling on whether the government's position was "substantially justified" under the Equal Access to Justice Act. 28 U.S.C. § 2412(d). An abuse of discretion standard, however, does not permit an appellate court to disregard its own or other precedent since "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Moreover, the reasoning underlying *Pierce* does not support any departure from the standard of independent appellate review on the legal issue of whether the law was clearly established. *Pierce* and other cases have recognized that exceptions to the norm of *de novo* review may be appropriate where the lower court "'is better positioned . . . to decide the issue in question,'" 487 U.S. at 559-60 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)), and where the issues are "'not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Pierce*, 487 U.S. at 561-62 (quoting Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 662-63 (1971)); *see also*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 403-04 (discussing same two factors); *Salve Regina*, 499 U.S. at 233 (discussing cases). The issue of whether the law is clearly established not only does not have either of these characteristics, but is the antithesis of such issues. The district courts are plainly not "better positioned" to decide the issue because qualified immunity requires an "objective" assessment

of legal authorities which are equally accessible to the appellate court. *Cf. Salve Regina*, 499 U.S. at 239 (state law is "equally communicable" to district and appellate judges). And, far from being resistant to the formulation of definite rules, the qualified immunity standard, by definition, requires determination of whether existing law has "clearly established" the standard of conduct. *Harlow v. Fitzgerald*, 457 U.S. at 818-19. Thus, nothing in the qualified immunity inquiry "warrants departure from a rule of independent appellate review." *Salve Regina*, 499 U.S. at 234.[9]

B. The Decision Below Is Inconsistent With The Purpose of Qualified Immunity.

Respondents also contend that "public policy considerations underlying qualified immunity" support the Elder rule. Resp. Br. at 27, 38. This argument, however, is based on a distorted characterization of the rationale behind this Court's rulings on qualified immunity. The purpose of qualified immunity is not, as Respondents suggest, a one-dimensional interest in reducing the cost of litigation to defendants by encouraging the early dismissal of civil rights actions. To the contrary, the qualified immunity standard strikes a "balance" between competing interests "in vindication of citizens' constitutional rights and in

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[9] The two other factors discussed in *Pierce* are simply not applicable to qualified immunity determinations. There is nothing in the law of qualified immunity comparable to the statutory direction in the Equal Access to Justice Act that this Court found significant in *Pierce* because it "suggests some deference to the district court." 487 U.S. at 559. In addition, the danger that a decision will "effectively establish the circuit law in a most peculiar, second handed fashion," that was present in *Pierce*, *id.* at 561, is not present in appellate review of qualified immunity claims since appellate courts should first determine whether the claim states a cause of action before addressing the qualified immunity issue, *see Siegert v. Gilley*, 111 S. Ct. at 1793, and the qualified immunity issue, by definition, requires that the court determine whether the legal rules are *already* "clearly established." *See* Petitioner's Brief at 13 n.2.

public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. at 195.

The Elder rule serves neither of these interests. While the qualified immunity standard is designed to encourage the dismissal of "insubstantial claims" prior to trial, *Harlow v. Fitzgerald*, 457 U.S. at 818, the Elder rule results in the dismissal of claims regardless of their merit. Thus, the Elder rule undermines "[t]he public interest in deterrence of unlawful conduct," 457 U.S. at 819, because it provides that claims against officials who have unreasonably violated federal rights shall be dismissed if, fortuitously, legal authorities are not identified during the district court proceedings. It also does not serve the public interest "in compensation of victims," *id.*, since it provides that victim's claim shall be dismissed as matter of law, even if the appellate court is aware of authority demonstrating that the claim is meritorious. *See* Petitioner's Brief at 23-28.

The one-sided nature of Respondents' definition of the public policy interest is reflected in the fact that their argument only discusses denying *de novo* review to plaintiffs, and not to defendants. Resp. Br. at 38-39. If applied equally, the Elder rule would also mean that defendants appealing a district court's denial of their qualified immunity claim would be barred from relying on authorities not identified below. Such a restriction would encourage, as Respondents say, "early resolution of the qualified immunity issue," Resp. Br. at 39, but it would also require officials to defend, and potentially be held liable for, claims that should be dismissed under governing law. *See* JA 60, 64. Respondents would undoubtably protest that such a restriction on appellate review of defendants' claims is inconsistent with the underlying rationale of qualified immunity, and that a party should not be so harshly penalized for counsel's failure to identify a legal authority in the district court. Restricting appellate review of plaintiffs' claims is improper for precisely the same reasons.

Finally, Respondents' argument that the Elder rule is justified as a means of preventing claimants from playing "dog in the manger" by deliberately withholding favorable

authorities in the district court, Resp. Br. at 32, 39, simply does not make sense. It is difficult, if not impossible, to conceive of any reason why a claimant would purposefully risk losing in the district court by withholding a helpful precedent until the appeal.

On the other hand, because of the "logistical burdens of trial court advocacy," *Salve Regina*, 499 U.S. at 231, the research and analysis that counsel and the court are able to bring to bear on the legal issues in the trial court will often be less thorough than that available on appeal, where "questions of law become the focus." *Id.* at 232. In the past this Court has recognized that "ours is not an ideal system," and the errors that occur within the system should not provide a basis for dismissing claims against officials that violate clearly established federal law. *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986). The Elder rule should be rejected because, rather than serving the purposes behind this Court's qualified immunity doctrine, it compounds the effect of oversights in the trial court by mandating that the appellate court close its eyes to precedent and affirm results based on errors of law.

CONCLUSION

For reasons stated above, and in our opening brief, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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